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## *In the Supreme Court of the United States*

JOHN A. PACE,

*Petitioner,*

v.

DAVID DiGUGLIELMO,
Superintendent, State Correctional
Institution at Graterford, et al.,

*Respondents.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

# BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers and its affiliate the Pennsylvania Association of Criminal Defense Lawyers file this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of Petitioner John A. Pace. [1]

### INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non–profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the preservation of access to federal habeas corpus and the interpretation of

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[1] The parties' letters of consent to the filing of this brief accompany the brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicui curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a Pennsylvania nonprofit corporation established in 1988, whose membership comprises over 600 public and private criminal defense attorneys from throughout the Commonwealth. An affiliate of NACDL, the Association attempts, as stated in its by-laws, "to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases"; "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself"; "to protect and insure by rule of law, those individual rights guaranteed by the Pennsylvania and United States Constitutions"; and "to promote the proper administration of criminal justice." PACDL is the only statewide organization working strictly on behalf of the professional interests of Pennsylvania's public and private criminal defense lawyers, including the rights of their clients. The members of PACDL are united in their support of keeping the cherished privilege of access to habeas corpus open as a safeguard for the protection of the federal constitutional rights of our clients. In particular, PACDL is concerned to ensure that the undue restrictions on the availability of state post–conviction relief in Pennsylvania are not incorporated into federal habeas corpus jurisprudence without a clear warrant in Congressional language. This *amicus* brief arises out of our members' dedication to the preservation of our system of justice.

## SUMMARY OF ARGUMENT

Before engaging in construction of the statutory tolling provision of 28 U.S.C. § 2244(d)(2) (2003), the Court should examine the assumption underlying its decisions in *Carey v. Saffold*, 536 U.S. 214 (2002), and



*Duncan v. Walker*, 533 U.S. 167 (2001), that this provision applies to petitioners whose convictions became final more than a year prior to AEDPA's effective date. Under a longstanding line of authority from this Court, it does not. Under the plain language of the AEDPA, petitioner's statute of limitations had run out before the new law was even passed. Although the circuits have all "created" a "grace period" of one year from April 24, 1996, to cover such cases, there is no basis in the statutory language and no general authority under Article III of the Constitution to "create" such a provision through judicial legislation. Rather, for lack of any properly legislated grace period, AEDPA's statute of limitations must be held unconstitutional or at least to be not retroactively applicable to prisoners such as petitioner. Applying pre-AEDPA law to the timeliness of his petition, there is no problem in the filing. In any event, even if a "grace period" applies, statutory tolling of that period is neither necessary nor appropriate. Because under all the circumstances petitioner filed his federal habeas petition within a reasonable time after April 1996, its filing was not outside any applicable statute of limitations.

To the extent that statutory tolling does apply, the court below erred in deferring to the state court in determining that petitioner's state post–conviction petition had not been "properly filed" under § 2244(d)(2). The state court held that petitioner failed to satisfy a new state statute of limitations for post-conviction filings. Because that provision lacked any "grace period" for second or subsequent filers whose convictions had become final years earlier, the state law to which the court below deferred was itself unconstitutional under this Court's cases. Whatever deference is due under § 2244(d)(2) to state court rulings on the timeliness of filings, none can be given to a ruling, which violates the Constitution.

Finally, petitioner was at least entitled to equitable tolling of any applicable statute of limitations. The equitable tolling doctrine is consistent with AEDPA, and should be applied with flexibility, taking into account the realities of the circumstances under which state prisoners, most of them indigent, uneducated and uncounseled, strive to protect their right to federal review of unconstitutional convictions and sentences.

## ARGUMENT FOR AMICI CURIAE

### I. FOR LACK OF ANY LEGISLATIVELY DETERMINED "GRACE PERIOD," THE AEDPA STATUTE OF LIMITATIONS CANNOT CONSTITUTIONALLY BE APPLIED TO OLDER CASES SUCH AS PETITIONER'S.

This case is not governed by the tolling provisions of 28 U.S.C. § 2244(d)(2) (2003). Petitioner's entitlement to federal habeas corpus review does not, therefore, depend on whether his state application for post-conviction relief was "properly filed" within the meaning of those provisions. Before assuming otherwise, this Court should first consider whether federal judges can create a non-statutory "grace period" exception to the AEDPA statute of limitations. The circuits, including the court below, have uniformly interpreted or applied the statute in this way, but none has explained how Article III permits it. The same unexplained assumption underlies the decision in *Carey v. Saffold*, 536 U.S. 214 (2002). This assumption does not withstand scrutiny. Since federal courts in fact do not have power to "create" a "grace period," the AEDPA statute of limitations is unconstitutional as applied to convictions which became final before April 24, 1996.



Moreover, even if the "grace period" were a valid *judicial* construct, it would not be subject to the limitations of *statutory* "tolling."

#### A. The federal courts lack competence to "create" a "grace period" exception to a statute of limitations which plainly lacks one.

In both *Carey*, 536 U.S. 214, and *Duncan v. Walker*, 533 U.S. 167 (2001), this Court appears to have merely assumed that a one-year "grace period" is part and parcel of the *statute* of limitations. *See also Artuz v. Bennett*, 531 U.S. 4 (2000). Indeed, in *Saffold*, the Court asserted, without explanation or analysis of statutory language, that the respondent, a prisoner whose conviction became final in 1992, faced a one-year period of limitation which "began running on AEDPA's effective date, April 24, 1996." 536 U.S. at 217. The basis for this assumption may have been, as the concurring opinion in *Walker* noted, that "[i]n the context of AEDPA's 1-year limitations period, ... the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA." 533 U.S. at 183 (Stevens & Souter, JJ.). [2]

The impetus for judicial creation of a grace period lies in a venerable constitutional rule. "The Constitution ... requires that statutes of limitations must '"allow a reasonable time after they take effect for the commencement of suits upon existing causes of action."'" *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461

[2] The concurring opinion cites such cases from every circuit which encompasses one or more states. *Duncan*, 533 U.S. at 183 n.1.

U.S. 273, 286 n.23 (1983) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982), in turn quoting *Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902)). The notion that a *court* can create a "grace period" to satisfy this constitutional requirement is of dubious validity at best. This is not an instance in which Congress failed to specify any statute of limitations, and the courts must therefore discern and apply the period which is most appropriate. *E.g., N. Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (listing many such cases). Unlike civil actions in the nature of tort or contract, after all, habeas corpus proceedings are subject to no limitations period at all but for statutory innovation. Nor does the AEDPA provision call upon the Court to decide whether and how to apply a common law rule to find the date on which a limitations period accrued, where Congress has specified the limitations period but not the accrual date. *See, e.g., Franconia Assocs. v. United States*, 536 U.S. 129, 141-42 (2002); *Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *United States v. Kubrick*, 444 U.S. 111 (1979); *Amy v. City of Watertown*, 130 U.S. 320 (1889) (discovery rule). Instead, Congress specified in AEDPA the period (one year) and also expressly described the four possible dates of accrual, or, one might say, the primary date of accrual and three special exceptions.

Section 2244(d)(1) of Title 28, as added by AEDPA, provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Ordinarily, that period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review ...." *Id.* § 2244(d)(1)(A). Alternatively:

> • "if the applicant was prevented from filing" by "State action in violation of the Constitution or laws of the United States," *id.* (d)(1)(B), or
>
> • if the petition is based on a "constitutional right" which "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," *id.* (d)(1)(C), or
>
> • if "the factual predicate of the claim or claims presented could" not "have been discovered" earlier "through the exercise of due diligence," *id.* (d)(1)(D),



then a different date will trigger the one-year limitations period. The Act explicitly states, in mandatory terms, that the limitations period "shall run from the latest of" these four dates. The latest of those dates, in petitioner Pace's case, was in 1986, when his conviction became final (*see Clay v. United States*, 537 U.S. 522 (2003) (explaining "became final" and "direct review," as used in § 2244(d)(1)(A))--not April 24, 1996. There is no statutory exception to subsection (d)(1)(A), nor is there any other delayed accrual rule, for cases where the conviction "became final" prior to April 24, 1996.

Section 2244(d)(1) thus violates the Due Process Clause, as construed by more than a century and a half of this Court's case law, at least as to those petitioners, like Pace, whose convictions became final more than one year prior to the enactment of the statute. As early as 1819, an opinion by Chief Justice Marshall declared:

> If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be

within it, there could be little doubt of its unconstitutionality.

*Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 207 (1819). Legislatures have generally heeded that warning ever since. In enacting AEDPA, however, Congress did not. The appropriate response is not for a court to rescue the statute by rewriting it, but to do its duty by declaring the law unconstitutional, if no fair construction of its terms is available to save the law. However well-intentioned the effort, it is an abuse of judicial power to draft and enact curative amendments to unconstitutional laws.

The virtually unanimous position of the circuits that the courts can create a "grace period" contradicts this Court's closest precedent. As the Court has recently stated, in the context of defining a statute of limitations, "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001), quoting *Glover v. Andrus Constr. Co.*, 446 U.S. 608, 616-17 (1980). Judicial creation of what amounts to a fifth subsection for § 2244(d)--the "grace period"--is thus an impermissible usurpation of legislative power. AEDPA specifies both the duration and the accrual date of the new statute of limitations; nothing is left for judicial construction. Accordingly, judicial revision of the statute to correct a due process defect--as contrasted with a true judicial construction effort – amounts to an abdication of the power and duty to declare a defective statute unconstitutional. *See United States v. Jackson*, 390 U.S. 570, 578-81 (1968).

While "federal habeas corpus has evolved as the product of both judicial doctrine and statutory law," *Duncan*, 533 U.S. at 183 (concurring opinion), the courts'



attempts to save the statute by announcing a judicially created grace period, *see id.*, transgress the limits of judicial power. True, "where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). For this reason, judges have often used statutory construction to ensure the presence of a grace period in a new statute of limitations where its absence would raise Chief Justice Marshall's constitutional question, such as cases in which a state enacted a new statute of limitations, or other legislative deadline for action, where none existed before. This can occur, however, only where the statutory language will fairly bear such construction, resulting not in the creation but in the *recognition* of what might be called a "grace period."

This Court has considered many cases involving new statutes of limitations, some questioning the sufficiency of legislated grace periods within which pre-existing claims had to be asserted or lost, and some requiring construction of the statute to determine whether a grace period was intended. In none of these cases, over the course of nearly two centuries, has this Court itself either created a "grace period" of limitations *ex nihilo* or declared what the grace period ought to be; instead the Court has deferred to the legislative judgment. The Court made crystal clear in *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 632-33 (1877), that new statutes of limitations are not unconstitutional under *Sturges* "if a reasonable time is given ... before the bar takes effect." Although stated in the passive voice, this

proviso refers to a time given *by the Legislature*, not by the Court itself. *Id.* at 633.[3]

Where no grace period is explicit in the new provision, avoidance of the constitutional problem has been achieved most often by interpreting an ambiguous term such as "accrue" so as to foreclose retroactive application of a statute of limitations. The AEDPA statute of limitations contains no such language which is susceptible to judicial construction allowing the creation of a grace period. *Compare United States v. Morena*, 245 U.S. 392 (1918) (addressing somewhat similar issue with respect to first establishment of seven-year limit on filing of petition for naturalization, where previously there had been none). In the first case without a statutory grace period to reach this Court, *Ross v. Duval*, 38 U.S. (13 Pet.) 45 (1839), the Court addressed when a Virginia statute of limitations should be deemed to start running after a provision was repealed which had formerly exempted persons who were out of state from the statute's reach. Absent clear statutory language, the Court held that the limitations period would be deemed to start running as of the date when, by virtue of the exemption's repeal, the limitations act "began to operate" against them.[4] This Court gave the same construction to an Illinois statute's use of the phrase, "within sixteen

[3] "In *all* such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed *in this statute* is, under all the circumstances, reasonable. Of that *the legislature* is primarily the judge ...." *Terry*, 95 U.S. (5 Otto) at 633 (emphasis added).

[4] While not explicit in the repealer provision itself, this had been the statutory rule in section 4 of the 1792 statute which was first made applicable to the plaintiff by the 1826 repealer. *See Ross*, 38 U.S. at 62.



years after the cause of such action shall have accrued," when a former exemption was repealed after the time would otherwise have expired. *Lewis ex rel. Longworth v. Lewis*, 48 U.S. (7 How.) 776 (1849).

The identical construction of the statutory term "accrued" was applied to a Kansas statute in *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873). Some courts have wrongly cited *Sohn* as supporting judicial creation of a grace period, but in fact the case involved nothing of the kind.[5] *See also Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906) (also construing statutes employing unspecified accrual dates). Yet even so, in *United States v. Lindsay*, 346 U.S. 568, 570 (1953), this Court expressly rejected the suggestion that "accrued" is necessarily "a word of art when used in such statutes." Instead, its meaning is to be ascertained in each case. AEDPA, by contrast with the statutes invoked in all those earlier cases, does not involve the

[5] The construction adopted in *Sohn* granted parties with existing claims the same amount of time as the statute gave prospectively to future parties, but measured the passage of time from the date of enactment The Court rejected the possibility of applying the legislation only to actions accruing after its adoption. "Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided." *Sohn*, 84 U.S. at 600. The Court did not say what "principle" it referred to. *Sohn* can be distinguished, if necessary, on the basis that the principle cited in that case, if valid, can only be a presumption for the construction of a statute, and in § 2244(d)(1) there is no language susceptible to construction. The statute expressly states all the different dates on which the limitations period can begin to run, and April 24, 1996, is not any of them.

construction of any ambiguous, undefined, or tradition-loaded statutory term, such as "accrued."

Congress plainly specified in AEDPA not only how long the statute of limitations was to be, but also the date as of which it was to begin to run--the latest of four rather clearly specified dates. *See Clay*, 537 U.S. 522. Accordingly, to read a grace period into AEDPA is simply an act of judicial legislation, beyond the lawful authority of any Article III court. *See also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (where "Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"). And without that grace period, the statute is unconstitutional as applied to convictions which became final more than one year prior to April 24, 1996.

Most of the cases commonly cited in discussions of this issue are in fact legislated "grace period" cases, where the role of the court has been to consider whether the grace period allowed by the statute itself was so short as to impair the obligation of contracts, U.S. Const. art. I, § 10 (particularly in cases pre-dating the Fourteenth Amendment) or to be unreasonable under the due process clause. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *Soper v. Lawrence Bros. Co.*, 201 U.S. 359 (1906) (Holmes, J.); *Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902); *Koshkonong v. Burton*, 104 U.S. 668, 675 (1882); *Terry*, 95 U.S. (5 Otto) at 628; *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831); *Jackson ex rel. Hart v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830). The same rule of reasonableness has been applied, albeit less frequently, to federal statutes of limitations. *See Block*, 461 U.S. at 286 n.23. In none of those cases, however, did the Court purport to define or determine a "grace period," nor did it approve the action of any lower court in having done so.



Only once, it appears, has this Court held that a legislated grace period was unreasonable and therefore unconstitutional. *See McGahey v. Vir. (In re Brown)*, 135 U.S. 662, 701-09 (1890). Even in that case, the Court did not proceed to declare a longer "grace period" on its own authority. Rather, the statute was declared "unconstitutional *and void*," *id.* at 707 (emphasis added), and the case remanded for further proceedings "as may be required by law and justice." *Id.* at 709.

But here there is no statutory language in § 2244(d) that is "susceptible to [a] construction ... by ... which such questions are avoided." In this circumstance, it is the duty of the judiciary not to correct the defect but to declare the law invalid. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.") (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)). Judicial review is limited to upholding or striking down the provision enacted by Congress. The approach taken by the circuits represents an unprecedented and dangerous twist on the doctrine of avoidance of constitutional questions in the construction of statutes.[6]

Faced with clear instructions from this Court on how to avoid a due process problem, Congress chose to adopt 28 U.S.C. § 2244(d) without a grace period. As a result, the statute is unconstitutional and void, at least

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[6] *See, e.g., United States v. Lopez*, 514 U.S. 549, 562 (1995); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 628-30 (1993) (compiling cases on avoidance of unnecessary constitutional issues); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also Jones v. United States*, 526 U.S. 227, 239-40 (1999) (related doctrine of "constitutional doubt").

as to those prisoners whose claims are divested by its plain language. At most, the Court should construe the statute of limitations as *inapplicable* to prisoners in Petitioner's position, in light of the impermissibly detrimental retroactivity that would otherwise exist. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994). To hold § 2244(d) inapplicable to older cases, such as Petitioner's, on this basis is not to reach an absurd result, giving him and similarly situated prisoners no limit on filing at all. Rather, it would leave in place the prior, longstanding "prejudicial delay" rule, R. Gov. §2254 Proc. 9(a), which was an aspect of the "abuse of the writ" doctrine. See *Vasquez v. Hillery*, 474 U.S. 254, 264-65 (1986).[7] It would also be consistent with history and common law, which eschewed both statutes of limitations and laches principles in habeas corpus cases. *See Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J.).

### B. Even if a "grace period" could be judicially "created," its duration would not be restricted by "statutory" or even traditional equitable "tolling."

If a "grace period" for filing habeas corpus petitions in pre-1996 cases was judicially created and exists outside and despite the statutory language of 28 U.S.C. § 2244(d), then the question arises whether that "grace period" is subject to strict "tolling," particularly statutory tolling, or whether it would instead be governed by a flexible rule of equity and reason. *Saffold* carefully parsed the language of § 2244(d)(2), the statutory tolling provision, to determine the timeliness of filing in that case--even though *Saffold's* case was governed, if at all, by the "grace period" and not by the § 2244(d)(1) statute of

[7] Like the AEDPA statute of limitations, the Rule 9 delay defense was affirmative and waivable in nature.



limitations itself. Yet § 2244(d)(2) only applies (by its terms) to "any period of limitation *under this subsection*." (emphasis added). Whatever sort of creature the "grace period" may be jurisprudentially, it is not a period of limitation "under" subsection 2244(d). *Saffold* never addressed this critical question of statutory language .

If the "grace period" is a judicial creation--rather than a construction of the statute, which it obviously is not--then there is no reason for that created period itself to be "construed" and applied as if it were itself a statute rather than an equitable doctrine. The only question should be whether, under all the circumstances, the prisoner, serving a sentence which became final years earlier, filed his federal habeas petition within a reasonable time after April 24, 1996. *Cf. Block*, 461 U.S. at 286 n.23 (describing as reasonable, under the Due Process Clause, a grace period shorter than newly created limitations period); *McGahey*, 135 U.S. at 701-09 (one year held not a constitutionally sufficient grace period of limitations, given difficulties in disposing of bonds in question).

Viewed purely as a question of reasonableness, exclusion from calculation of that year of all the time that petitioner was responsibly seeking state court relief, thereby assuring exhaustion of remedies in the event he later needed to turn to the federal court, would surely be appropriate. Thus, the equitable rule of reason employed by the court to measure the "grace period" in a given case need not and should not be as tightly constrained as the doctrine of equitable tolling sometimes has been held to be in the lower courts. *See, e.g., Calderon v. U.S. District Court*, 128 F.3d 1283, 1289 (9th Cir. 1997) (extraordinary circumstances "beyond prisoner's control make it impossible to file petion on time"). After all, absent the judicially "created" grace period, the petitioner's action would not be unfairly barred, as in the usual equitable

tolling context. To the contrary, the prisoner would be free to file his or her habeas corpus petition at any time that did not prejudice the respondents' ability to answer. *See Vasquez*, 474 U.S. at 264-65. When the courts apply equitable tolling cautiously, they show deference and respect for the legislative judgment behind the establishment of a statute of limitations. No such restraint need be shown by the courts in ameliorating the limits of their own creations.

No elaborate discussion of the application of § 2244(d) is necessary in a "grace period" case where the *statute* of limitations did not apply at all. On all the facts and circumstances of the case, petitioner Pace plainly filed his federal habeas corpus petition within a reasonable time after the enactment of AEDPA. For this reason as well, the judgment of the court below must be reversed.

## II. A FEDERAL COURT MAY NOT GIVE EFFECT TO AN UNCONSTITUTIONAL STATE TIMELINESS RULE IN DETERMINING WHETHER AN APPLICATION FOR STATE POST-CONVICTION REVIEW WAS "PROPERLY FILED" FOR AEDPA STATUTORY TOLLING PURPOSES.

Even if it were decided that federal courts have the power to engraft a grace period onto a claim-destroying statute of limitations to save its constitutionality, and even if the Court were also to find that AEDPA excludes equitable tolling, Petitioner was still entitled to consideration of his first federal habeas corpus petition under a proper application of AEDPA's statutory tolling provision. By deferring uncritically to the state court's finding that Petitioner's November 1996 PCRA petition was untimely as a matter of state law, and therefore not "properly filed," 28 U.S.C. § 2244(d)(2), as a matter of



federal law, the Third Circuit concluded that Petitioner was not entitled to statutory tolling of AEDPA's one-year limitations period. Regardless of whether state court timeliness decisions are entitled to blind deference by federal courts--even those decisions that are arbitrary and irrational--a federal court must not give effect to a state timeliness rule that violates the petitioner's federal constitutional rights.

Yet that is precisely what occurred here. Petitioner's 1996 PCRA petition was held to clash with a newly enacted state statute of limitations that for the first time made untimely a second or subsequent petition for post-conviction relief filed by a prisoner, such as Petitioner, whose conviction had become final on or before the effective date of the new law. Once the new law took effect, Petitioner and those similarly situated lost the right they previously had enjoyed, to apply for collateral review of claims not previously litigated or waived, unhindered by any time bar. A new or amended statute of limitation that has such an effect is unconstitutional and a nullity. This Court should therefore rule that an application for state post-conviction relief will be deemed to have been "properly filed" for purposes of §2244(d)(2) if the application would have been accepted in state court but for an unconstitutional timeliness rule. And whether the state rule passes federal constitutional muster is, of course, a matter for determination by the federal court in its application of § 2244(d)(2), not one on which deference is owed to the state courts.

The salient facts are that Petitioner filed his first and only federal habeas corpus petition *pro se* on December 24, 1999, seeking release from custody under a state court judgment of sentence that had become final in 1986. Assuming the validity of the one-year judicially created "grace period," and further assuming that "tolling" applies to that "grace period" just as it does to a

statutory limitations period, the federal petition had to be filed by April 24, 1997, to be timely unless the limitations period was tolled equitably or by statute. Section 2244(d)(2) provides that the limitations period will be tolled during the time that a "properly filed" application for state post-conviction relief is pending in state court. Petitioner filed his first petition for relief under the PCRA (which was his second petition for state collateral review of his conviction and sentence) on or shortly before November 27, 1996,[8] well within one year after the effective date of the new law. Proceedings on that petition continued until July 29, 1999, when the Pennsylvania Supreme Court denied Petitioner's petition for review. The district court determined that excluding the time during which his PCRA petition was pending, Petitioner's federal habeas corpus petition was timely filed, *Pace v. Vaughn*, 151 F. Supp.2d 586, 595-96 (E.D. Pa. 2001), and that ruling went unchallenged in the court of appeals.

Deferring to the Pennsylvania Superior Court, as it believed under circuit precedent it was obliged to, the court of appeals determined that Petitioner's PCRA petition had not been timely filed under applicable Pennsylvania law. Because it was untimely, said the court, the petition was not "properly filed" within the meaning of §2244(d)(2) and hence was ineffective to trigger statutory tolling under AEDPA.

The Pennsylvania timeliness rule that was held to require dismissal of Petitioner's PCRA petition was enacted into law on November 17, 1995, as an amendment to Pennsylvania's Post-Conviction Relief Act,

[8] The uncertainty in this regard pertains to the "prisoner's mailbox" rule.



42 Pa.Cons.Stat.§ 9545(b). Before that date, there was no time bar in Pennsylvania to the filing of applications for post-conviction relief, whether first petitions, second, or otherwise. With the enactment of §9545(b), which had an effective date of January 16, 1996 (60 days after enactment), a second or subsequent petition filed under the PCRA had to be filed "within one year of the date the judgment [became] final" subject to three specified exceptions that did nothing to ameliorate the claim-destroying impact of the amended law on already-final judgments.[9] As Petitioner's judgment of sentence became final in 1986, the right that he possessed up to January 16, 1996, to file a new state court petition asserting new claims for post-conviction relief was extinguished on that date under rulings of the Pennsylvania appellate courts that post-dated his November 27, 1996 petition.[10]

[9] As discussed in the petitioner's merits brief, there was also a controversy, as of the time of enactment of the 1995 PCRA amendments and for some years thereafter, whether certain judge-made exceptions to the statutory deadline might also be available to extend or waive the limitations period.

[10] Petitioner's application would have been saved from the new time bar if the Superior Court had found that the application was the "first petition" that Petitioner had filed under the PCRA, which it literally was in that his prior petition had been filed under a predecessor statute to the PCRA (the Post-Conviction Hearing Act, or "PCHA") and not under the PCRA. The court failed to give Petitioner the benefit of the uncodified proviso to the 1995 amendment to §9545 that established a one-year grace period from January 16, 1996, in favor of first-time PCRA petitioners whose judgments became final on or before that date. Section 3(1) of Act 1995 (Spec.Sess. No. 1), Nov. 17, P.L. 1118, No. 32, appended in Historical and Statutory Notes to 42 Pa. Cons. Stat. § 9545 (1995 ed.). *Commonwealth v. Thomas*, 718 A.2d 326, 329 (Pa. Super. 1998)

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By extinguishing the right of Petitioner and all prisoners in like circumstances to file a second or subsequent application for post-conviction relief, amended §9545 ran afoul of the constitutional rule of long-standing, enunciated by this Court, that statutes of limitations that cut off existing remedies are invalid unless they afford "'a reasonable time after they take effect for the commencement of suits upon existing causes of action...'" *Texaco,* 454 U.S. at 528 n. 21, quoting *Wilson*, 185 U.S. at 62-63. *See also, e.g., Block*, 461 U.S. at 286 n.23, and *Terry,* 95 U.S. at 634.

AEDPA's time bar was enacted with the same claim-extinguishing feature, but the lower federal courts, unlike their Pennsylvania counterparts, deemed it to lie within their province to rectify the constitutional defect by creating the grace period that Congress had omitted to supply. (The invalidity of that approach is discussed under Point I of this brief.) Quite apart from any question about the retroactivity of AEDPA's limitations period, without a grace period under state law, statutory or judge-made, Petitioner was deprived by the newly amended §9545 of any reasonable opportunity to seek post-conviction relief based on claims that were not and could not have been raised in his first application for post-conviction relief, such as the failure of his PCHA counsel to provide constitutionally effective assistance.

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(holding that "it was the intention of the legislature to permit an otherwise untimely first PCRA petition to be filed within one year following the effective date of the 1995 PCRA amendments, but the exception was not intended to apply to subsequent petitions"; therefore a "second attempt at post-conviction relief...filed more than one year after [petitioner's] judgment of sentence became final...was untimely filed").



What constitutes a reasonable opportunity "in a particular case depends upon its particular facts." *Terry,* 95 U.S. at 637.

Pennsylvania did, to be sure, postpone the effective date of the newly enacted time bar for 60 days. Although probably unintended, one effect of this delay was to give its prisoners a little under two months within which to file a second or subsequent petition. Sixty days may be a sufficient period of time for commercial actors with known causes of action and the assistance of lawyers to react to a change in the law that shortens the time available to them to assert their claims.[11] Sixty days hardly qualifies as an adequate opportunity for untutored, unrepresented prisoners to learn of an as-yet-ineffective change in the statutory law, ascertain its significance to them personally, and formulate an application for post-conviction relief that preserves all of their potential grounds for relief. Of course, if the Commonwealth had made a showing that it took measures to inform its captive population of the new law and provided some means for prisoners such as Petitioner to exercise their swiftly vanishing right to file a new petition for collateral review, those facts would make it a closer call as to whether sixty days was reasonable in the circumstances. Needless to say, no such showing has ever been made, in the district court or elsewhere.

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[11] Nine months was considered adequate in *Terry v. Anderson* to protect the rights of the creditors of an insolvent Georgia bank to press claims against the bank's shareholders that rested upon four-year-old debts. In *McGahey,* 135 U.S. at 701-09, on the other hand, a grace period of one full year was held constitutionally insufficient, in light of the practical difficulties involved in disposing of certain bonds, as required under the amended law.

The Commonwealth did not assert that Petitioner's application was time-barred under amended § 9545(b) until the application had been denied on the merits and an appeal taken to the Pennsylvania Superior Court. When the Commonwealth raised the issue, Petitioner answered in his reply brief, among other things, that the retroactive application of the new time bar to defeat his application would deprive him of his right to due process of law, citing the governing decisions of this Court. In so arguing, he effectively invited the Pennsylvania court to construe the statute in a way that would both spare his petition from the limitations guillotine and preserve the new statute of limitations, as applied to second and subsequent petitions, from being voided on constitutional grounds. The invitation was not accepted, and his petition was ruled untimely.

Untimely the petition may have been for purposes of 42 Pa. Cons. Stat. § 9545, but not for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2). Had Pennsylvania conditioned access to post-conviction relief either on the payment of a nonwaivable fee that exceeded the means of indigent prisoners, or upon the petitioner's oath of allegiance to a particular religious denomination, the Commonwealth would not be heard to say that a petition that failed to satisfy one or the other of these requirements was not "properly filed" for purposes of tolling the AEDPA limitations period. The federal courts may or must look to state law in making the federal law determination of whether a state court petition was "properly filed" for tolling purposes, but the state law must be compatible with the federal Constitution. Otherwise federal courts will find themselves in the position of enforcing unconstitutional state laws and of giving encouragement to states to manufacture impediments to state collateral review as a way of undermining statutory tolling and frustrating access to the Great Writ itself.



The new Pennsylvania timeliness rule denied due process to a class of prisoners to which Petitioner belonged by eliminating their existing right to file an application for post-conviction relief without affording them any more than a chimerical opportunity to exercise the right before it vanished. Such a rule cannot be the legal standard for deciding if a petition was properly fi[illegible] any more than could a state law that imposed a means test in violation of the Equal Protection Clause or a religious test in violation of the Free Exercise and Establishment Clauses.

## III. EQUITABLE TOLLING, WHICH OPERATES ON BROAD PRINCIPLES OF REASONABLENESS, IS PERVASIVE IN THE LAW OF LIMITATIONS AND APPLIES TO HABEAS CORPUS CASES UNDER AEDPA

This Court should accept the wisdom of all the Circuits and confirm that principles of equitable tolling apply broadly to the AEDPA statute of limitations, particularly in "grace period" cases. The courts of appeals have uniformly held that the AEDPA filing deadline (including the judicially created "grace period") is not jurisdictional, but rather is a statute of limitations, and that as such, it is subject to equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000) (collecting cases). For a variety of important reasons, the AEDPA statute of limitations must be subject to traditional equitable tolling, free of formalistic constraints--as is compatible with Congress's intent

### A. Equitable tolling does not involve a set of rigid rules.

"Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance . . . . Every system of laws must necessarily be

defective; and cases must occur to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office therefore of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the lawgiver . . . ." 1 JOSEPH STORY, EQUITY JURISPRUDENCE 7-9 (14th W. Lyon ed. 1918). Accordingly, "[i]t is hornbook law that limitations periods are 'customarily subject to equitable tolling,'" and "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (citations omitted). Thus, where consistent with the overall congressional purpose of a statute, a "traditional equitable tolling principle" should be applied to its limitations period. *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1990); *see, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (noting that time "requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,' and holding that the same rule applies in suits against the Government); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (holding that some equitable exceptions are "read into every federal statute of limitations"); 3 JOSEPH STORY, EQUITY JURISPRUDENCE 556-59 (14th W. Lyon ed. 1918).[12]

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[12] This Court has applied equitable tolling under a broad range of federal statutes. *See, e.g., Young*, 535 U.S. at 49-50 (equitably tolling statute of limitations in Bankruptcy Code provision that discharged tax liabilities arising from returns filed more than three years before bankruptcy filing); *Irwin*,, 498 U.S. at 95-96 (applying equitable tolling principles in action under Title VII of the Civil Rights Act of 1964); *Honda v. Clark*, 386 U.S. 484, 500 (1967) (equitably tolling statute of limitations under Trading with the Enemy Act, which statute allowed non-enemy creditors to recover seized assets of Japanese nationals); *Holmberg*, 327 U.S. at 397 (applying

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This sort of "traditional equitable tolling" does not involve a system of rigid or categorical rules, but rather takes into account the particular circumstances of each case, as an aid to the Court in doing justice. "Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction." 1 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE 703 (Lawyers Co-Operative Publishing Co. 1918) (emphasis original). This includes authority to "interfere in many cases to prevent the bar of the statutes [of limitations] where it would be inequitable or unjust." 3 JOSEPH STORY, EQUITY JURISPRUDENCE 557 (14th W. Lyon ed. 1918); *see also Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 214-19 (3d Cir. 2002) (Becker, Ch.J.: choosing, as "a matter of policy" in the absence of a statutory or majority common law rule, a flexible over mechanical rule for equitable tolling to reverse dismissal of civil action under Lanham Act, despite attorney's erroneous decision to sue in court lacking personal jurisdiction over defendant).

Habeas corpus jurisprudence traditionally involved no statute of limitations at all, nor even the doctrine of laches. See *Vasquez*, 474 U.S. at 264-65; *Heflin*, 358 U.S. at 420 (opinion of Stewart, J., for five Justices). For this generous tradition, there were obvious reasons of policy dating to Magna Carta and earlier--the primacy of respect for liberty over efficiency and finality

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equitable tolling principles in equity action under Federal Farm Loan Act).

in the criminal justice system. Yet even though it was classified historically as a writ "at law," habeas corpus was always governed by equitable principles. *Fay v. Noia*, 372 U.S. 353, 438 (1963). Thus, it is particularly suitable that when importing a legalistic statute of limitations into the jurisprudence of the Great Writ legislatively, the courts--unless plainly directed otherwise--continue to apply those equitable principles. One such application is the leavening of the limitations provision with a broad infusion of equitable tolling.

### B. Equitable tolling is available even though AEDPA specifies various alternative start dates for the one-year limitations period and includes a specified basis for statutory tolling.

Under AEDPA, the one-year limitations period runs from the latest of four specified times.[13] The presence of these alternative start dates in no way rebuts the presumption, recognized in *Irwin*, 498 U.S. at 95-96, that equitable tolling applies not only in private party suits but also in suits against the Government. *Irwin* poses the "negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original). Here, that negative question must itself be answered in the negative.

A Congressional intent to exclude equitable tolling has been found only where various unusual combinations of factors have pointed toward that conclusion. For example, the Court has excluded equitable tolling when the statute at issue "already effectively allowed for equitable tolling," contained an "unusually generous . . . [twelve year] limitations time period," and concerned an area – land ownership – in which it is of "special importance that . . . [persons] know with certainty what their rights are . . . ." *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *see Brockamp*, 519 U.S. at 352 (finding equitable tolling excluded where allowing equitable tolling would "work a kind of linguistic havoc" and would be anomalous in an area of law – tax – that "is not normally characterized by case-specific exceptions reflecting individualized equities").

None of these factors is present in the instant case. The exceptions in § 2244(d)(1) are not equitable in nature, but are designed to ensure that a petitioner will not be inappropriately denied the writ because of later arising circumstances. *Harris*, 209 F.3d at 329.[14] This is

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[13] These are: "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and make retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1).

[14] The presence of a general "good cause" extension provision for filing under the special part of AEDPA (Chapter 154 of title 18), governing capital habeas proceedings in opt-in states, does not suggest that the absence of such a provision in § 2244(d) shows Congress specifically intended to preclude equitable tolling under the latter section. Rather, the point of 28 U.S.C. § 2263(b)(3)(B) is to *limit* "tolling" for otherwise undefined "good cause" in that special class of expedited cases to a period of no more than 30 days. It does carry a negative

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in keeping with the congressional goal behind AEDPA time limits of promoting "comity, finality, and federalism," *Carey*, 536 U.S. at 222 (quoting *Duncan*, 533 U.S. at 178), without undermining the high purposes of the writ. Moreover, the one-year AEDPA limitations period could not plausibly be described as "unusually generous," nor is there a *special* need for finality in deciding the legality of detentions, especially in light of the important interests protected by the Great Writ. The large number of persons found in recent years to be innocent after being sentenced to death due to various miscarriages of justice is testament to the continuing truth of this 40-year-old warning. *See, e.g.*, BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). Indeed, given these interests, the narrowness of the statutory exceptions, and the *shortness* of the one-year period, the statutory purpose is *better* served by a robust doctrine of equitable tolling. *See Honda*, 386 U.S. at 500 (finding that the "statutory purpose is best served by invoking the equitable tolling doctrine" in an action under the Trading with the Enemy Act)

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implication for the interpretation of the general run of AEDPA cases, but that implication does not imply any intent to eliminate equitable tolling in ordinary habeas cases. Rather, it implies the opposite--that equitable tolling in non-"opt-in" cases does *not* have any such artificial, statutory constraint attached. *See also Young*, 535 U.S. at 53 (presence of statutory tolling rule in one part of statute does not imply displacement of equitable tolling elsewhere, when period to be tolled in each instance is not the same).



There are two primary circumstances in which equitable tolling is permitted--when a diligent litigant files on time, but in the wrong court, as in *Burnett*, and when a litigant is misled or tricked by the adversary into missing a deadline. *Young*, 535 U.S. at 43, 50-51, citing *Irwin*, 498 U.S. at 96. However, those circumstances are not exclusive. *Young*, 535 U.S. at 50 (citing *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)). For example, where the adversary acts--even legally--to prevent the petitioner from filing on time, the deadline is equitably tolled.[15] The court below erred in concluding that the time necessarily spent by Petitioner in attempting to file, in good faith, a state post-conviction petition which he reasonably believed might be found by the state courts to be timely (or at least might not be found to be untimely) could not be taken into account.

As former Chief Judge Becker wrote in *Waters*, 296 F.3d at 214-19, in words not heeded by his colleagues on the court below, "[A]ll equitable doctrines ... demand flexibility in order to avoid the arbitrariness of rigid rules." *Id.* at 218. This Court agrees: "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett*, 380 U.S. at 427. The congressional goal behind the AEDPA time limits is to promote "comity, finality, and federalism," *Saffold*, 536 U.S. at 222, quoting *Duncan*, 533 U.S. at 178, without fatally undermining the high purposes of the Great Writ and its availability to wrongfully convicted prisoners. Those balanced purposes cannot properly be achieved without applying a flexible doctrine of equitable tolling.

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[15] This was the case in *Young*, where petitioners' bankruptcies prevented the IRS from acting within statutory period to audit their returns; accordingly, the limit on the government's time to act was tolled.

The outcome of applying such equitable tolling in this case is clear. Petitioner is entitled to equitable tolling because, after he diligently and reasonably pursued his claims, he was unfairly denied access to habeas relief. When Petitioner filed his PCRA petition, it seemed that the state courts would review his claims even if they were untimely under the PCRA's statutory language. Given this, and especially given that federal law *required* him to pursue those remedies before filing a habeas petition, Petitioner pursued the only reasonable course open to him. This alone demands equitable tolling. Moreover, Petitioner came upon this elaborate legal trap as an indigent, *pro se* litigant and now faces a severe sentence, facts that cannot be lost on traditional equitable principles of fairness and reasonableness.

## CONCLUSION

For the reasons discussed in this brief of *amici curiae*, in addition to those discussed in the brief for Petitioner, the judgment of the United States Court of Appeals for the Third Circuit must be reversed and the case remanded to the district court to address the merits of Petitioner's claims.

Respectfully submitted,

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